

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

- - - - - X
UNITED STATES OF AMERICA) 15CR227
)
vs.
) Buffalo, New York
RICHARD PETIX,) April 6, 2017
) 10:30 a.m.
Defendant.)
- - - - - X

Status Conference
Transcribed from an Electronic Recording Device

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE CHARLES J. SIRAGUSA
UNITED STATES DISTRICT JUDGE

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P R O C E E D I N G S

* * *

THE COURT: -- city of Rochester. I don't know what the strength of the case is. And I don't know much about the case. But, obviously, if there were a conviction, by the time, again, you can clearly outline for me -- outline for me, what is the case -- what is your case here? What is your proof?

MR. XIANG: Well, Judge, first of all, we have the night he was arrested, so that was the night it was an undercover agent that has a meeting with him that is observed and it's on tape and it's observed by other agents and observed by probation. And that is when the transaction goes down. He transfers about \$13,000 in Bitcoin to the agent, but he gets taken down. At that time, the laptop is still up. One of the flash drives is plugged in. We're able to see many Bitcoin transactions, historical transactions that is on a Wallet that we can still see there. And now, so that is -- that is that incident. And what leads up to it, we have at least two or three counter parties of his who had transactions with him over the course of about a year and a half, about the same period I'm talking about.

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2 THE COURT: The reason I'm bringing it up, Mr.
3 Petix, and I'm talking to you, I don't have any idea of the
4 strength of the case. And as I think was clear last time, I'm
5 not really conversant in Bitcoins. Counsel are much more so
6 than I. I don't know whether you would be convicted after
7 trial. I'm telling you what my intention is on the R & R to be
8 up front. One of the things defendants usually ask their
9 lawyers is, do you think I'll be convicted after trial. I
10 don't know. I don't know what your lawyers have told you. I'm
11 just saying that is a question that usually defendants ask
12 their lawyers because if the answer is -- and understand, no
13 one can say anything to a certain degree, because you never
14 know what a jury is going to do, but certainly, lawyers with
15 Mr. Leonardo's experience and Mr. Lembke's experience, they can
16 give you a good idea of what they think, not that they wouldn't
17 do their best, obviously, to see that a not guilty verdict is
18 brought back, but they can give you kind of a good idea of what
19 they think would happen. If the answer is, yeah, there is a
20 good chance you could be convicted, then typically what lawyers
21 want to do is see if they can make the best deal from it for
22 their client. I'm pointing out, if this case were to be tried
23 and if you were to be convicted, then, I mean, obviously, I
24 think I'm right on the R & R, but if I'm wrong, it's going to
25 take at least, what? A year?

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2 THE DEFENDANT: A year to get to a trial?

3 THE COURT: No. What I'm saying is this, and I
4 want to talk to your family, too. And I'm sure counsel have,
5 too. We have the issue of the R & R. As I told you before, we
6 went through some of the cases, and I talked about the weight
7 of authority. In other words, cases from other jurisdictions
8 and other judges who went against what Judge Scott said. And I
9 said that I believe the weight of authority is contrary to what
10 Judge Scott determined. And since it's on appeal to me as a
11 district judge, I have to review everything de novo and make a
12 decision. Now, I'll render a written decision, as I said, but
13 I'm just saying, I believe the weight of the authority is
14 correct and Judge Scott should not have granted a motion to
15 dismiss the second count of the indictment, okay? Am I right?
16 Am I wrong? It would be up to the court above me to determine
17 that. I mean, obviously, I think I'm right or I wouldn't make
18 the decision, but I've thought that before and been reversed by
19 the court above me. However, it doesn't get to the court above
20 me until we would go through a trial and there would be a
21 conviction. Obviously, if you were acquitted of that charge at
22 trial, there is no issue. If you're acquitted of both charges,
23 there is no issue. I don't know, what are the Guidelines if he
24 is convicted of Count 1?

25 MR. RESNICK: Judge, it would be probably a zero

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2 to six.

3 THE COURT: So the second count is really the ball
4 game. If you were convicted of the second count, by the time
5 it got to Second Circuit and they reversed it, and I'm talking
6 about an appeal, if you were convicted of the second count, by
7 the time it got to the Second Circuit, I'm saying, probably
8 would be a year. That is probably a fact of life because that
9 is probably -- wouldn't you agree, counsel, that would be a
10 quick turn around?

11 MR. LEMBKE: Yes. By then he would be out of
12 custody, regardless, I think, of what happens after a trial.

13 THE COURT: You're right. He would be out of
14 custody regardless of what happens after a trial. But I don't
15 know, if you take, if you add three more points for acceptance,
16 if that jumps, I don't know what that does to the Guidelines.
17 I haven't seen the plea agreement. As I said, I'm not trying
18 to get involved. I don't know what is included and what is not
19 included in the plea agreement. All I know is both sides are
20 indicating to me that the recommended Guidelines would be 24 to
21 30 months. Whatever you want to do is fine with me. If you
22 want to put this down for a trial, it's easy, we can do that.
23 Tell me how long it will take and we'll pick a week.

24 MR. LEONARDO: Judge, my client has asked that the
25 motion that he be advised with regard to Judge Scott be

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2 withdrawn and the matter be placed on your trial calendar.

3 THE COURT: I don't understand the motion to be
4 withdrawn.

5 MR. LEMBKE: You don't have to rule on the R & R,
6 the speedy trial clock runs today and we have a trial within 70
7 days. And if Mr. Petix decides to plead guilty, he can walk in
8 here any day and plead guilty.

9 THE COURT: That is a very good point, Mr. Lembke.

10 MR. LEMBKE: On the 69th day.

11 THE COURT: And the only difference would be the
12 three points for acceptance.

13 MR. LEMBKE: Maybe he gets two or three or maybe
14 none, who knows. Maybe we're right on many of the Guidelines
15 and were wrong and maybe you can sentence him to anything you
16 want to.

17 THE COURT: I'm sure both sides have taken the
18 time. Probation is helpful on the Guidelines. Kathy, let's
19 figure out a time.

20 MR. LEMBKE: Is there any time off of the speedy
21 trial clock?

22 MR. RESNICK: Motions are still pending.

23 MR. LEMBKE: Not now they're not.

24 MR. RESNICK: If you're withdrawing today, they
25 start tomorrow.

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2 MR. XIANG: I don't think so.

3 THE COURT: I'm looking at May 1st for a trial
4 date. I think that is the -- I know. I know you are making
5 that application because you want to book a trial date as quick
6 as possible and I'm trying to give that to you.

7 MR. LEONARDO: Very well, your Honor. That is
8 good for us.

9 THE COURT: That is subject to me going over my
10 calendar. And so if you try it on May 1st, how long will the
11 case take?

12 MR. XIANG: I think proof will be about three
13 weeks -- I'm sorry, three days.

14 THE COURT: Should be a week trial?

15 MR. XIANG: Yes, sir.

16 THE COURT: Would you agree with that, counsel? I
17 don't know if you have any.

18 MR. LEONARDO: Judge, from what we've seen so far,
19 that would appear to be a fair estimate.

20 THE COURT: I want to be clear, for the record,
21 that Mr. Leonardo, the government has filed objections to Judge
22 Scott's R & R. What you're indicating to me is that -- and
23 it's a little confusing because he issued this decision, the
24 government is objecting, you are withdrawing any application to
25 dismiss Count 2. Is that correct?

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2 MR. LEONARDO: Yes, that's correct.

3 THE COURT: Is the government satisfied that
4 suffices?

5 MR. RESNICK: Yes. I just want to -- I don't want
6 to speak for counsel, that means his appeal rights for that
7 issue would be no longer there.

8 THE COURT: Right. Do you understand that? Do
9 you understand that, Mr. Petix?

10 THE DEFENDANT: My appeal rights to the motion or
11 my appeal rights to the whole charge in general?

12 THE COURT: To the motion. So you made a motion
13 to dismiss Count 2. Okay? What you're doing now, what Mr.
14 Leonardo and Mr. Lembke are saying is, you're withdrawing that
15 application to dismiss Count 2. It doesn't mean that, based on
16 something that happens at trial, you can't appeal, you know.
17 For example, if you believe the evidence is insufficient to
18 convict you of Count 2, you can always raise that on appeal.
19 Would you agree with that, counsel?

20 MR. LEMBKE: As a factual matter.

21 THE COURT: As a factual matter.

22 MR. LEMBKE: Yes. What we've done with the motion
23 here is a motion based on the pleadings of the indictment.
24 Okay. And my advice to him and our advice to him is that he
25 withdraw that particular motion. It does not mean we give up

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2 our legal issues, for example, for purposes of the jury charge.

3 THE COURT: No, you can.

4 MR. LEMBKE: And the sufficiency of the evidence
5 and whether or not --

6 THE COURT: No. What Mr. Lembke is saying is when
7 the time comes, I'll give you an example, Mr. Petix, at the
8 close of the government's case, the defense can make a motion
9 for a judgment of acquittal. Mr. Lembke is indicating they're
10 going to make a motion based on the fact they believe the facts
11 are legally insufficient to support the charge for whatever
12 reason. And what I'll say, whatever I say, if I said, no, I
13 think you're wrong, Mr. Lembke and Mr. Leonardo, you can have
14 an exception, so they then have an appeal. Does that make
15 sense to you?

16 THE DEFENDANT: It all makes sense to me.

17 THE COURT: Okay. We'll talk to Kathy and make
18 sure we can do it that week because we have stuff to move
19 around. We'll try this, the week of May 1st, and go in there.
20 So it will be up to the jury. Now, we'll issue a pretrial
21 order. One of the things I would expect is, and I would,
22 hopefully, it's in the order, whoever your witnesses are,
23 you'll notice them the day before so they can prepare whatever
24 cross examination they want so we don't delay any proceedings.
25 Mr. Lembke has tried cases in front of me before, and Mr.

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2 Resnick has, also, so you understand my pretrial order.

3 Anything further?

4 MR. LEMBKE: Your Honor, it should be specific
5 here today that Mr. Petix is happy with a May 1st trial date.
6 I don't mean happy, he consents to that, because I believe the
7 Speedy Trial Act states that it might be 30 days from
8 arraignment, there is a minimum 30-day period. He waives that
9 minimum 30-day period.

10 THE COURT: Just so we're clear, I clearly
11 understand the defense's strategy. You want -- Mr. Petix wants
12 to have as prompt a trial as possible. The Court is trying to
13 accommodate that request. To the extent there is any -- I
14 don't know if there is any time constraints, the Court
15 understands, to the extent there are any, Mr. Petix, you're
16 waiving those, correct?

17 THE DEFENDANT: Yes, your Honor.

18 THE COURT: The Court has dealt with Mr. Petix
19 before. The Court does find, to the extent a waiver is
20 necessary, the waiver is being entered knowingly, intelligently
21 and voluntarily. And that is after you talked to Mr. Leonardo
22 and Mr. Lembke?

23 THE DEFENDANT: I'm not waiving my right to a
24 speedy trial.

25 THE COURT: You're actually getting a speedier

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2 trial. You're waiving the right to have the trial delayed so
3 you can get a speedier trial. Makes sense?

4 THE DEFENDANT: Yes, your Honor.

5 THE COURT: And you're in agreement with that?

6 THE DEFENDANT: Yes, your Honor.

7 THE COURT: And you discussed that with your
8 lawyers?

9 THE DEFENDANT: Yes.

10 THE COURT: Kathy.

11 MR. RESNICK: Your Honor, you're going to issue an
12 order with regard to the withdrawal of that motion? A written
13 order?

14 THE COURT: I'm asking you to submit it. The
15 government can prepare it and have both sides sign it. They're
16 withdrawing the motion. They're withdrawing the pretrial
17 motion to dismiss Count 2. I'll ask you to prepare the order
18 and settle it with Mr. Lembke and Mr. Leonardo. And once it's
19 signed by both sides, submit it to me and I'll sign it. Okay?

20 MR. RESNICK: Yes, Judge. As far as the
21 violation, we'll adjourn that until after trial?

22 THE COURT: Makes most sense to adjourn the
23 violation out. Let me ask another question, because it was
24 brought up about what else is on the electronic media. Is the
25 government still trying to determine what, if anything, is on

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2 -- it's a flash drive, correct?

3 MR. XIANG: Six flash drives, Judge, yes.

4 THE COURT: Have you determined -- you can't
5 without the password?

6 MR. XIANG: We could. We would have to -- we
7 don't have the resources to be able to analyze that within an
8 acceptable amount of time. The decryption process, I think, is
9 estimated at three years.

10 THE COURT: Let me stop you. I think, if I'm Mr.
11 Petix, this is a consideration to me. When you say within a
12 period of time, what's, being candid, the proposal, the thought
13 was there might be child pornography or something else?

14 MR. XIANG: That's right, your Honor.

15 THE COURT: Isn't the statute of limitations five
16 years on prosecuting those crimes?

17 MR. RESNICK: I believe it's ten years for child
18 pornography.

19 THE COURT: All right, ten years. You're telling
20 me within ten years you can't find out what is on that
21 electronic media?

22 MR. XIANG: Judge, we can. That wasn't the time
23 frame we had thought.

24 THE COURT: I'm not talking about the time frame
25 you thought. I'm just trying to make sure that, you know,

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2 everyone understands this. And I thought you were saying you
3 can't get into those and you're telling me you can, but it
4 would take time.

5 MR. XIANG: Yes, that is what we anticipate. We
6 would have to brute force it, meaning especially, potentially,
7 try every type of pass codes that are mathematically possible.
8 We might strike lucky on the first try, chances are we aren't
9 going to.

10 THE COURT: Listen, they managed to get all of our
11 government stuff by doing something similar.

12 THE DEFENDANT: It was the Russians?

13 THE COURT: That was the Chinese. The Russians
14 probably already had it.

15 MR. LEMBKE: The pass code was Obama.

16 THE COURT: All I'm saying, I want Mr. Petix to
17 know if you're going to pursue that, because if you're going to
18 pursue that, then that might be a consideration. In other
19 words, in exchange for resolving this, there was a commitment
20 from the government not to examine what is on those discs, that
21 may be a factor. I don't know what's on them, you don't know
22 what's on them. The only one that knows what's on them is Mr.
23 Petix and counsel. I don't know if that is a legitimate
24 consideration. I understood you couldn't get the information
25 unless you had the pass code, and you're telling me you can, it

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2 just would take time, essentially. So, if you could tell me,
3 is the government -- where are the flash drives?

4 MR. XIANG: They should be with HSI, in HSI
5 custody. And, Judge, the plea, the offer we made, which allows
6 the parties to argue that, for my purposes, would have
7 terminated the case.

8 THE COURT: And I want to make sure everyone
9 understands, you're not terminating the case. I thought it was
10 essentially terminated because you couldn't find out what was
11 on the flash drive anyway. You're telling me there are ways
12 with computer programs, et cetera, et cetera, that you might be
13 able to, in a month or two months, three months, four years,
14 find out what is on the flash drives.

15 MR. RESNICK: Another consideration, your Honor,
16 because it's a ten-year statute, technology can change where it
17 may be easier, five years from now, to be able to get into
18 those things. That is speculation, but you know how technology
19 works.

20 MR. LEMBKE: We're at the end of technology now.

21 THE COURT: I wish you were right, Mr. Lembke.

22 MR. LEMBKE: There is nothing else.

23 THE COURT: We've gone from Facebook to Instagram.

24 MR. LEMBKE: When you can watch --

25 THE COURT: You'll get emersed in those in no

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2 time.

3 MR. LEMBKE: You can watch March Madness on your
4 phone in a courtroom, you can't get any better.

5 THE COURT: So we have no idea -- if you told me
6 you could go to Wegmans and swipe your card and pay your bills
7 thirty years ago, I would have said you are nuts, but not so
8 much. I'll put it down for trial and if you want to explore
9 that option further, you can. But I want you to understand,
10 Mr. Petix, that the government is saying they may be able to
11 access what is on the flash drives. If they do and they find
12 something of a criminal nature, they have 10 years to submit
13 those charges. They're telling me, in the plea agreement that
14 they submitted, they're planning to forego any further
15 prosecution based on what they may find on the flash drives.
16 Okay, counsel, we'll issue a pretrial order. Thank you.

17 DEFENDANT'S FATHER: Your Honor, considering the
18 fact that my son has already served the majority of his
19 sentence, is there a possibility to give him bail?

20 THE COURT: I think I reviewed that issue a couple
21 of times and there is no application before me, and I don't
22 know what I would rule. Probably not. I'm trying to give him,
23 in that regard, I'm trying to give him as quick a trial date as
24 I can, which is less than a month away, which is pretty quick.

25 DEFENDANT'S FATHER: In the absence, 24 months

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2 would be 20 months. By the time trial concludes, he'll have
3 the sentence served whether he is guilty or innocent.

4 THE COURT: That is the Guidelines. I don't know
5 what the maximum is. What is the maximum?

6 MR. XIANG: Ten years.

7 THE COURT: Maximum ten years, and the Guidelines
8 would probably go up.

9 MR. XIANG: 33 to 41.

10 THE COURT: Go up to 33 to 41 because he'll lose
11 points for what is called acceptance. Mr. Leonardo can explain
12 that to you, okay?

13 DEFENDANT'S FATHER: Yes, Judge.

14 THE COURT: Thank you.

15 DEFENDANT'S FATHER: Thank you.

16 THE COURT: You have a nice day, folks.

17 CERTIFICATE OF TRANSCRIBER

18

19 I certify that the foregoing is a correct transcript from
20 the official electronic sound recording of the proceedings in
21 the above-entitled matter.

22

23 /s Karen J. Bush, RPR

24 Official Court Reporter

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